Atlantic's, SBC's, and U S WEST's operations. The data appear to include in most instances allocations of common costs and overheads, as defined above.[213]

- The U S WEST data comes from an ex parte letter in which US WEST provides the results of its March 1999 revision of a prior examination of its subscriber list information-related costs. This letter states that U S WEST's estimated subscriber list information-related costs are between $0.015 and $0.02 per listing for both base file subscriber list information and updates to those files.[214]

- The Bell Atlantic data comes from Bell Atlantic's January 1999 filing with the New York Public Service Commission (New York Commission) in response to the New York Commission's directive that Bell Atlantic establish cost-based rates for the provision of subscriber list information to directory publishers.[215] That filing indicates that Bell Atlantic's cost of providing base file subscriber list information is $0.0305 per listing.[216]

- The Ameritech data comes from an ex parte letter in which Ameritech provides the results of a cost study performed in 1996 in response to an Indiana Utility Regulatory Commission (Indiana Commission) decision regarding the exchange of base file subscriber list information among carriers participating in extended area arrangements.[217] This letter states that Ameritech's long-run incremental cost of

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[213] *See* para. 76, *supra*. We note that the Southwestern Bell Telephone Company (SWBT) data as well as the data regarding BellSouth's base file subscriber list information costs do not appear to include overheads.

[214] Letter from Elridge A. Stafford, Executive Director-Federal Regulatory, U S WEST, to Magalie Roman Salas, Secretary, FCC, at 1 (filed Mar. 17, 1999) (*U S WEST Mar. 17, 1999 Letter*). Prior to this revision, U S WEST had estimated costs of $0.04 per listing for base file information and $0.06 per listing for updates. Letter from Elridge A. Stafford, Executive Director-Federal Regulatory, U S WEST, to Magalie Roman Salas, Secretary, FCC, at Att. (filed Mar. 11, 1999) (*U S WEST Mar. 11, 1999 Letter*).

[215] The New York Commission required that subscriber list information rates be set at forward-looking incremental costs. *Universal Regulatory Framework Competition*, Case No. 94-C-0095, Order Resolving Petitions for Rehearing and Clarification, 1999 WL 107421, at *7 (N.Y. PSC 1999).

[216] Letter from Sandra Thorn, General Counsel, New York Telephone, to Debra Renner, Acting Secretary New York Pub. Serv. Comm'n, at Att, p. 54 (Jan. 19, 1999) (*Bell Atlantic Jan. 19, 1999 Letter*) (*reproduced in ADP Mar. 30, 1999 Letter*, *supra* note 169, at Att F).

[217] *Ameritech Apr. 28, 1999 Letter*, *supra* note 178, at 4. *See also Extended Area Service*, Cause No. 40097, 1996 WL 481197, *10 (Indiana Util. Reg. Comm'n 1996) (*Indiana Extended Area Service Decision*) (requiring that exchanges of listing information between carriers be priced at long-run incremental cost).

providing white pages listing information to carriers is $0.11 per listing.[218] Ameritech submitted information on how it calculated this amount, subject to a request for confidential treatment.[219]

- The BellSouth data comes from a cost study BellSouth performed in 1993 for a proceeding before the Florida Public Service Commission (Florida Commission). That study states that BellSouth's "incremental" cost of providing base file subscriber list information is $0.003 per listing.[220] After considering that study, the Florida Commission observed that a rate of $0.04 per listing for base file subscriber list information "will allow [BellSouth] to recover the cost of providing the service and will provide appropriate contribution."[221] In addition, in an ex parte letter, BellSouth maintains that its cost of providing updates "far exceeds" $0.06 per listing, with the claimed cost per listing amount submitted under a claim of confidentiality.[222]

- The SBC information comes from a cost study Southwestern Bell Telephone Company (SWBT) performed in 1988 that indicates that costs of providing base file subscriber list information of less than $0.01 per listing.[223]

94. ADP has proposed that a rate of $0.04 per listing should be viewed as presumptively reasonable for base file subscriber list information. Based on the preponderance of the evidence in the record in this proceeding, we conclude that a rate of $0.04 per listing should allow most carriers to recover the incremental costs of providing base file subscriber list information to directory publishers and provide a reasonable contribution to those carriers' common costs and overheads. Four of the five carriers for

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[218] An extended area arrangement permits telephone subscribers in one exchange area to call subscribers in another exchange area without incurring toll charges.

[219] *Ameritech Apr. 28, 1999 Letter*, *supra* note 178, at 4. This *Third Report and Order* addresses neither Ameritech's requests for confidentiality nor the BellSouth request described in the text accompanying note 222, *infra*.

[220] *BellSouth Feb. 8, 1993 Letter*, *supra* note 177, at Att, p. 3. We note that this cost figure appears to include a portion of the common costs that BellSouth would include in its subscriber list information rates.

[221] *BellSouth Telecommunications, Inc.*, Order No. PSC-93-0485-FOF-TL, 141 PUR 4th 520 (Fl. Pub. Serv. Comm'n 1993) (abstract of decision) (*Florida Commission 1993 Decision*).

[222] Letter from Ben G. Almond, Vice President-Federal Regulatory, BellSouth, to Magalie Roman Salas, Secretary, FCC, at Att., p.2 (filed May 3, 1999) (*BellSouth May 3, 1999 Letter*).

[223] *ADP Mar. 30, 1999 Letter*, *supra* note 169, at Ex. C, p. 3. Although ADP assumes that SWBT was calculating its incremental costs of providing subscriber list information, this cost figure appears to appears to include common costs as defined above. *See id.* at 6 & Ex. C, p. 3;

which we have cost data indicate that their cost of providing base file subscriber list information to directory publishers is less than $0.04 per listing. Most of these cost studies are relatively recent (or were recently revised), and were undertaken to determine the cost of providing subscriber list information to directory publishers.

95. Although the precise methodologies the carriers used in determining these average costs are not before us, each carrier's data are consistent with our understanding that the incremental costs of generating a download are fairly low.[224] Each carrier's cost data indicate that the carrier's incremental costs are well below $0.04 per listing.[225] Indeed, two these carriers' cost data indicate that base file subscriber list information costs less than $0.01 per listing to provide.[226] This implies that, for most carriers, a rate of $0.04 per listing should provide reasonable contributions to common costs and overheads.

96. Prices for commercial lists support our conclusion that a rate of $0.04 per listing would enable carriers to recover their incremental costs of providing base file subscriber list information to directory publishers plus reasonable contributions to common costs and overheads. The process involved in maintaining and distributing subscriber list information is quite similar to the process of producing and distributing commercial lists. As indicated above, buyers (i.e., directory publishers) do not consider commercially available lists to be a close substitute for subscriber list information, because commercially available lists are typically outdated for purposes of publishing directories.[227] We would expect, however, the costs of providing such information to the buyer to be similar, because they both involve pulling names and related information from a database.[228] Many commercial list providers sell direct marketing information similar to subscriber list information at prices of

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[224] *See* para. 77, *supra*.

[225] Each of the cost estimates in the record appears to cover the carrier's of incremental costs of providing subscriber list information to directory publishers. *See, e.g., BellSouth Feb. 8, 1993 Letter, supra* note 177, at Att, p. 3 (costs of $0.003 per listing BellSouth's provision of base file subscriber list information); *ADP Mar. 30, 1999 Letter, supra* note 169, at 6 (costs of less than $0.01 per listing for SBC's provision of base file subscriber list information). We note that Ameritech's includes many common cost items, as defined in part H.3, *supra*, within what it describes as its long run incremental costs. *See Ameritech Apr. 28, 1999 Letter, supra* note 178, at 4-5.

[226] *See* note 224, *supra*.

[227] *See* para 87, *supra*.

[228] We note that commercial list providers' costs are likely to be higher than carriers' costs, since carriers obtain subscriber list information "quite easily" during the order-taking process for telephone exchange service. *See Feist*, 499 U.S. at 340.

around $0.04 per listing, according to a recent issue of SRDS *Direct Marketing List Source*.[229] Residential lists such as Lighthouse List's Consumers and Homeowners, and Resnet, have a base price of $0.035 per listing, while ABLE Consumer/Residents, American Family Consumer, and US Phonebase lists have a base price of $0.04 per listing.[230]

97. Ameritech has submitted the results of a cost study, which it presents as demonstrating that its cost of providing base file subscriber list information is $0.11 per listing. While we cannot discuss the details of the study here, since they were submitted under a claim of confidentiality, we do not believe Ameritech's cost estimate of $0.11 is credible, for several reasons. First, Ameritech's estimate is much larger than those submitted regarding other carriers, and Ameritech has given us no reason to believe its costs are significantly different from those of other LECs.[231] Second, we observe that Ameritech has chosen to make available its residential subscriber list information in the commercial list market for only $0.075 per listing.[232] This casts doubt on Ameritech's assertion that its cost of providing subscriber list information to directory publishers is $0.11 per listing, as we would expect Ameritech to be selling this information in the commercial list market at a rate that would enable it to recover its costs, including some profit.[233] Finally, Ameritech's

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[229] SRDS *Direct Marketing List Source* is a catalog of lists used for direct marketing purposes. SRDS is an acronym for Standard Rate and Data Service.

[230] We note that Ameritech, Bell Atlantic, Cincinnati Bell, and U S WEST offer subscriber list information lists (without telephone numbers) on this market for $0.055 to $0.065 per listing for residential lists, and $0.06 to $0.075 per listing for business lists. These carriers charge $0.015 to $0.02 extra for telephone numbers. These prices are sometimes lower than what these carriers charge independent directory publishers. We do not use these prices as proxies for cost-based competitive market prices for subscriber list information, however, since we have no basis to determine whether they are cost-based. Instead, these prices reflect the completeness and accuracy of carrier databases, compared with other sources of names, addresses, and phone numbers, and hence reflect the carriers' unique, monopoly-derived control over subscriber list information. SRDS *Direct Marketing List Source*, at 495, 521, 2300-01, & 2320 (Feb. 1999).

[231] We note that Ameritech claims that its subscriber list information product is of a higher quality than the standard product other LECs provide, and therefore deserves a higher rate. *See Ameritech Apr. 28, 1999 Letter*, *supra* note 178, at 1-3. Independent directory publishers dispute this claim. *See, e.g.*, Letter from Bradley R. Kruse, Corporate Counsel, McLeodUSA, to Magalie Roman Salas, Secretary, FCC, at 1-2 (filed May 26, 1999) (*McLeodUSA May 26, 1999 Letter*). While we do not resolve this dispute in this *Third Report and Order*, the existence of this dispute provides an additional reason for not relying on Ameritech's submission in determining presumptively reasonable rates for subscriber list information carriers provide directory publishers.

[232] SRDS *Direct Marketing List Source*, *supra* note 230, at 2300.

[233] We have already noted that there are no close substitutes to subscriber list information, suggesting that this profit could be substantial. This price of $0.075 also implies that a large contribution to common costs was included in Ameritech's cost estimate of $0.11, since we would expect that the price of $0.075 that it charges

estimate includes large allocations of common costs and overheads. Therefore, Ameritech may be attempting to place disproportionate costs on directory publishers.[234]

98. Based on the record in this proceeding, we therefore agree with ADP that a rate of $0.04 per listing is presumptively a reasonable rate for base file subscriber list information.

99. We also conclude that a rate of $0.06 per listing should allow most carriers to recover the incremental costs of providing updated subscriber list information to directory publishers and reasonable contributions to those carriers' common costs and overheads. An additional $0.02 per listing may be necessary to compensate carriers for any additional costs of providing updates. This higher presumptively reasonable rate also is consistent with the fact that carriers generally provide updates to directory publishers in quantities smaller than those in which the carriers provide base file subscriber list information. Since ADP proposes a rate of $0.06 per listing for updates, we find it appropriate to set the presumptively reasonable rate for updates at $0.06 per listing without resolving whether an update rate closer to $0.04 per listing also would advance Congress' goals in relation to subscriber list information.

100. The presumptive figure of $0.06 per listing is based on the assumptions that (1) a carrier's allocations of common costs and overheads should not vary significantly according to whether a directory publisher requests updated, rather than base file, subscriber list information;[235] and (2) a carrier's incremental costs of providing subscriber list

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on the list market more than covers its incremental costs.

[234] In addition, we note that the Ameritech data were prepared in response to an Indiana Commission decision addressing inter-carrier provision of subscriber list information. We cannot be certain that these data accurately reflect the cost of providing subscriber list information to directory publishers. *Indiana Extended Area Service Decision, supra* note 178, at *10 (stating that Indiana Commission decision does not apply to rates carriers charge non-carriers for subscriber list information). Ameritech has not shown that its incremental costs do not differ for orders from non-carriers, or that a different allocation of common costs would not be appropriate for its provision of subscriber list information to all directory publishers. Indeed, Ameritech states that it "does not possess a cost study that encompasses all of the appropriate costs of supplying [subscriber list information]." *Ameritech Apr. 28, 1999 Letter, supra* note 178, at 4.

[235] The common costs should not vary significantly because carriers use the same databases to support their base file and updated subscriber list information operations. The overheads do not vary because, by their nature, these costs do not increase or decrease depending on a carrier's subscriber list information-related activity. *See, e.g., Christopher C. Pflaum, Competitive Issues Relating to Subscriber List Information, at 10 (June 1996) (reproduced in* ADP Comments at Att. 11) ("Virtually all of the costs associated with the acquisition, compilation, and maintenance of listings are costs that would have to be incurred whether or not the telephone company itself produced directories; they are integral to maintaining the infrastructure of the telephone company"); *U S WEST Mar. 17, 1999 Letter, supra* note 214, at 1 (cost range of $.015 to $.02 per

information should not significantly vary with the type of subscriber list information requested.[236] For instance, we would expect a carrier to have similar order-taking processes for base file and updated subscriber list information. The costs of downloading and shipping the data on paper, magnetic tape, or other transmission medium also would not vary depending on whether base file or updated subscriber list information is being transmitted. While some LECs may incur data processing costs in providing updated subscriber list information that they do not incur in providing base file subscriber list information, there is evidence in the record that many LECs' computer systems already have the capability of selecting and downloading subsets of their subscriber list information databases.[237] Thus, these additional programming and processing costs should not be significant, to the extent they exist at all.[238] We therefore conclude that the overall incremental cost of providing updates should not be much higher than the cost of providing base file subscriber list information. The additional $0.02 cents per listing that ADP proposes is reasonable and should easily cover these additional costs, for larger volumes of updates.

101. Only two carriers submitted data regarding their update costs. U S WEST claims that its cost of providing updated subscriber list information is between $0.015 and $0.02 per listing, the same range as for its base file information.[239] In contrast, BellSouth

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listing for both base file and updated subscriber list information.

[236] *See, e.g.*, Letter from Sal Gonzalez, President, the little Yellow Pages, to Magalie Roman Salas, Secretary, FCC, at 2 (filed Mar. 5, 1999) (*Little Yellow Pages Mar. 5, 1999 Letter)* (costs of extracting updates do not vary significantly from costs of extracting base file subscriber list information); *Letter from Mark D. Maynard, Senior Operations Manager--Directory, Time Warner Telecom,* to R. Lawrence Angove, ADP, at 1 (filed Mar. 4, 1999) (*Time Warner Mar. 4, 1999 Letter)* ("[T]he costs associated with processing [Time Warner's subscriber list information] is so nominal as to be impossible to quantify. Assuming that Time Warner had all its directory listing information in an electronic file, there would be no appreciable difference in the cost of supplying a publisher with an entire listing file . . . or with daily updates); Petition of MCI Telecommunications Corp. for Arbitration of Directory Assistance Listings Issues under Federal Telecommunications Act of 1996, Docket No. 19075, Arbitration Award, (Pub. Util. Comm'n of Texas Aug. 13, 1998) (difference of $0.0003 per listing in volume-sensitive costs between base file and updated listing information).

[237] *Little Yellow Pages Mar. 5, 1999 Letter, supra* note 236, at 2; *Time Warner Mar. 4, 1999 Letter, supra* note 236, at 1.

[238] *Little Yellow Pages Mar. 5, 1999 Letter, supra* note 236, at 2; *Time Warner Mar. 4, 1999 Letter, supra* note 236, at 1; *see also* BellSouth Feb. 8, 1993 Letter, *supra* note 177, at Att, p. 5 ($2.30 in data processing costs per central office file). We note that carriers are not expected to change their internal systems so they can provide subscriber list information according to schedules or at unbundling levels they cannot already accommodate. *See* part II.G, *supra.*

[239] *U S WEST Mar. 17, 1999 Letter, supra* note 214, at 1.

argues that the cost of providing updates "far exceeds" $0.06 per listing.[240] BellSouth, however, provides no explanation of why its incremental costs or common cost allocations for updates would be significantly higher than its corresponding costs for base file subscriber list information.[241] Based on the very limited evidence before us, we conclude that in most circumstances the presumptively reasonable rate proposed by ADP of $0.06 per listing will cover the incremental costs of providing updates and provide reasonable contributions to the carrier's common costs and overheads.

102. We are concerned, however, that the rates that we deem presumptively reasonable may not always permit a LEC to recover all of the incremental costs, plus a reasonable share of common costs and overheads, involved in providing small quantities of listings to a directory publisher. That is, if the carrier has been asked to perform specialized sorts or provide updates that involve only a few listings, it may incur costs that are not recovered by the per listing rates of $0.04 and $0.06.[242] We are also concerned that per listing rates of $0.04 and $0.06 may not adequately compensate some high-costs carriers even for downloads involving large numbers of listings. In these, relatively rare cases, higher rates would be appropriate. Any carrier that chooses to charge a rate in excess of $0.04 per listing for base file or $0.06 per listing for updated subscriber list information should bear the burden of establishing in a complaint proceeding that this rate would not enable it to recover its costs.[243]

103. For the reasons stated above, we conclude that, in most circumstances, rates of $0.04 and $0.06 per listing will enable carriers to recover the incremental costs of providing

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[240] *BellSouth May 3, 1999 Letter*, *supra* note 222, at Att, p. 2. The data BellSouth provided regarding its update costs consists of BellSouth's estimate of the per listing cost of providing updates, submitted under claim of confidentiality. No details or evidence were provided to support this number. *See id.* at Att., Ex. D (redacted copy).

[241] *See BellSouth May 3, 1999 Letter*, *supra* note 222, *passim*.

[242] Bell Atlantic notes that for a base listing of 50,000 listings with a 20 percent annual churn rate, there would be fewer than 40 changes per day to report. At $0.06 per update this would yield only $2.40 per day to cover the fixed costs involved for each day's extraction and transmission of updates. Letter from Joseph J. Mulieri, Director, Government Relations -- FCC, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, at 4 (filed Apr. 20, 1999) *(Bell Atlantic Apr. 20, 1999 Letter)*. Of course, how large those fixed costs are will depend on the medium of transmission. Electronic transmission of updates is likely to cost less than paper or magnetic tape delivery.

[243] Carriers may wish to set a minimum charge per download to ensure that they recover the fixed costs associated with a download. We do not have sufficient evidence in this proceeding to declare what is a presumptive rate for such a minimum charge. Carriers that set a minimum charge should be ready to provide credible and verifiable data that such a minimum charge reflects the cost of providing a download, in the event a complaint is lodged with the Commission.

subscriber list information to directory publishers and provide reasonable contributions to the carriers' common costs and overheads. Because these rates are cost-based, they also should promote the development of a competitive directory publishing market. We therefore conclude that they are presumptively reasonable.

104. Having presumptively reasonable rates of $0.04 and $0.06 per listing should reduce the regulatory costs to carriers and directory publishers. Carriers will not have to provide detailed cost studies, except in complaint proceedings. Moreover, to the extent that carriers charge the presumptively reasonable rates, independent directory publishers will not have to incur the expense of filing complaints. Setting forth in this proceeding our views on what rates are presumptively reasonable should reduce regulatory and litigation costs to carriers, independent directory publishers, and this Commission.

6. Complaint Procedures

105. We recognize that the presumptions we establish here might not accommodate all the circumstances in which the cost of subscriber list information might vary. We therefore do not preclude carriers from charging, or directory publishers from seeking, rates different from those we determine are presumptively reasonable in this *Third Report and Order*. In certain circumstances, the actual cost per listing could be higher than the presumptively reasonable rates we set forth above. For instance, for some smaller carriers a rate of $0.04 per listing may not be enough to cover the costs associated with providing base file listings, since the number of listings involved could be small. In these situations, carriers presumably would be able to justify a higher rate or minimum charge.[244] In another portion of this *Order*, we conclude that we have authority under section 208 of the Communications Act to adjudicate complaints regarding compliance with section 222(e).[245] In any future federal subscriber list information rate proceeding, the burden of proof will be on the carrier to the extent it charges a rate above the presumptively reasonable rates.

106. We will rely on the section 208 complaint process to ensure that subscriber list information rates are reasonable. In the event a directory publisher files a complaint regarding a carrier's subscriber list information rates, the carrier must present a cost study providing credible and verifiable cost data to justify each challenged rate. This cost study must clearly and specifically identify and justify:

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[244] *Bell Atlantic Apr. 20, 1999 Letter*, *supra* note 242, at 4. In this context, a minimum charge would require a directory publisher to pay at least a predetermined amount regardless of the number of listings requested.

[245] *See* parts III.A, *supra*, & III.C, *infra*.

a. Incremental Costs. Each specific function the carrier performs solely to provide subscriber list information to the complainant; and the incremental costs the carrier incurs in performing each of these specific functions.[246]

b. Common Costs. The cost the carrier incurs in creating and maintaining its subscriber list information database and the methods the carrier uses to allocate that cost among supported services.[247]

c. Overheads. Any other costs the carrier incurs to support its provision of subscriber list information to the complainant; the other activities those costs support; and the methods the carrier uses to allocate those costs.

d. Other Information. The projected average number of listings the carrier provides to directory publishers and, if applicable, to other entities in a year; the rate of return on investment and depreciation costs the carrier uses in calculating its subscriber list information rates; and any other information necessary to make clear the carrier's costing process.

The carrier should provide this information separately for both base file and updated subscriber list information if the complainant challenges both types of rates. We also expect the carrier to describe how its methods for allocating common costs compare to those the carrier uses in other contexts. In the absence of cost data showing that the carrier's costs exceed the presumptively reasonable rates, the Bureau or the Commission, depending on the circumstances, shall find in favor of the plaintiff, and award damages accordingly.

107. We conclude that the approach adopted above provides the most efficient means of ensuring that subscriber list information rates are reasonable.[248] This approach will enable parties to turn resources that would otherwise be expended to litigate subscriber list information rates to competing based on the quality of the products provided to consumers.[249]

I. Subscriber List Information Formats

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[246] These costs should exclude all costs that the carrier would not have incurred but for its provision of subscriber list information to the complainant.

[247] These costs should exclude all costs that the carrier would not have incurred but for its need to create and maintain a database containing subscriber list information.

[248] *ADP Mar. 30, 1999 Letter*, *supra* note 169, at 17.

[249] In part II.G, *supra*, we address the requirement that subscriber list information rates be nondiscriminatory.

108. In the *Notice*, the Commission sought comment on "the format in which [subscriber list] information should be provided."[250] Although the commenters propose a wide variety of formats,[251] several commenters suggest that the Commission should not impose formatting requirements that burden carriers or constrain technology.[252]

109. We require each carrier to provide subscriber list information gathered in its capacity as a provider of telephone exchange service to a directory publisher in the format the publisher specifies, if the carrier's internal systems can accommodate that format. If the carrier's systems cannot accommodate the requested format, the carrier must inform the directory publisher of that fact and tell the publisher which formats it can accommodate as well as the date by which it can accommodate the publisher's request in each of these formats. The carrier must provide this information within thirty days of when it receives the publisher's request. The carrier also must provide the requested subscriber list information in the format the publisher selects from among those available and, unless the publisher requests a later date, by the date the carrier stated for that format. This approach will minimize burdens on both directory publishers and carriers, by allowing each directory publisher to request the format that it is likely to find most useful while making it unnecessary for the carrier to incur substantial costs to reformat subscriber list information for directory publishers. It also will allow directory publishers and carriers to change formats as technology advances.[253]

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[250] *Notice*, 11 FCC Rcd at 12532, ¶ 45.

[251] *E.g.*, ADP Comments at 18 (camera-ready format and, if the carrier is able, an electronic medium); CBT Comments at 12 (format that the carrier uses to produce white pages listings); ITAA Comments at 11 ("conventional machine-readable" format); MCI Comments at 22 (electronic format); YPPA Comments at 12 (hard copies, magnetic tapes, computer diskettes, or other electronic storage means, but the carrier should not have to expend resources to place the information in a particular electronic format); IIA Reply at 2 (in any format requested, as long as the carrier already uses that format).

[252] *E.g*, ALLTEL Comments at 7 (the Commission should not require LECs to re-engineer their data processing systems to provide listings in a form not normally maintained by the carrier); CBT Comments at 12 (unless a carrier and directory publisher agree otherwise, carrier should provide subscriber list information in the format the carrier uses to produce white pages listings); YPPA Comments at 12 (a carrier should not be required to perform additional engineering, programming or work, or expend additional resources to place the information in a particular electronic format). *But see* ITAA Comments at 11 (in view of the abundance of available database software, LECs should not encounter any difficulty in delivering subscriber list information in conventional machine-readable form).

[253] We note that in part III.E, *infra*, we conclude that, under section 251(b)(3) of the Act, a providing LEC must provide directory assistance database information in any format the requesting LEC provider specifies, if the LEC's internal systems can accommodate that format.

110. In any dispute regarding a carrier's ability to provide subscriber list information in a particular format, the burden will be on the carrier to show that its internal systems cannot accommodate the format the directory publisher requests.[254]

J. Directory Publishing Purposes

1. Background

111. Section 222(e) gives directory publishers a right to obtain subscriber list information "for the purpose of publishing directories in any format."[255] In the *Notice*, the Commission sought comment on what safeguards may be necessary to ensure that a person seeking subscriber list information is doing so for the specified "purpose of publishing directories in any format."[256] The Commission also sought comment on how and to what extent a telecommunications carrier subject to section 222(e) requirements may require a person or entity requesting subscriber list information to certify that it will be used only for directory publishing purposes.[257] The Commission asked whether requests for subscriber list information should be in writing or whether they could be made orally.[258]

2. Safeguards

112. Subscriber list information is used for many purposes other than directory publishing. These include traditional directory assistance services as well as the preparation of direct marketing lists. We conclude that carriers may take reasonable steps, as specified below, to ensure that a person requesting subscriber list information pursuant to section 222(e) intends to use it only for directory publishing purposes.[259]

113. As several commenters suggest, we conclude that carriers may require directory publishers to certify that they will use subscriber list information obtained pursuant

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[254] *See* para. 69, *supra*.

[255] 47 U.S.C. § 222(e).

[256] *Notice*, 11 FCC Rcd at 12532, ¶ 45.

[257] *Id.* at 12532, ¶ 46.

[258] *Id.*

[259] We note that in part IV.A.3, *infra*, we invite comment on whether an entity that obtains directory assistance data pursuant to section 251(b)(3) may use them for directory publishing or other purposes.

to section 222(e) only for directory publishing purposes.[260] While MCI expresses concern that carriers will demand certifications as an anticompetitive tactic, the record in this proceeding does not show that concern to be well-founded.[261]

114. The certification may be either oral or written, at the carrier's option.[262] Since directory publishers generally obtain subscriber list information through written contracts, a written certification should not impose any additional burden on directory publishers. We decline to prescribe the precise wording of any certification, as ADP suggests, because such a step appears unnecessary at this time.[263]

115. We also decline to adopt YPPA's proposal that we permit a carrier to refuse to disclose subscriber list information when the carrier reasonably believes a directory publisher will use that information for purposes other than, or in addition to, directory publishing.[264] YPPA suggests that, in this circumstance, the carrier should not need to disclose subscriber list information unless and until we were to rule against the carrier in response to a complaint under section 208 of the Communications Act.[265] This approach would require a directory publisher to undergo the expense of filing and prosecuting a complaint prior to obtaining subscriber list information in the event that the carrier from which the information is sought concludes that the publisher will use that information for purposes other than directory publishing. Because the need to file and prosecute such complaints would delay the directory publisher's receipt of subscriber list information, this approach would be inconsistent with the requirement that directory publishers receive that information "on a timely . . . basis."[266] If disputes regarding subscriber list information usage arise, the carrier may seek a determination that it need not provide subscriber list information to a particular person that the carrier believes will use the information for purposes other than directory publishing. Pending resolution of such a dispute, the carrier shall continue to provide subscriber list information to the directory publisher absent an order to the contrary.[267] This

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[260] *See, e.g.*, ADP Comments at 23; PacTel Comments at 19; SBC Comments at 18.

[261] *Compare* MCI Comments at 23 *with* ADP Comments at 23-25 (reasonable certifications permissible).

[262] *E.g.*, ADP Comments at 23; SBC Comments at 18.

[263] *See* ADP Comments at 23-24.

[264] YPPA Comments at 12; YPPA Reply at 9.

[265] YPPA Comments at 12; YPPA Reply at 9.

[266] 47 U.S.C. § 222(e).

[267] Absent an order permitting such action, the withholding of subscriber list information from a directory publisher will constitute a rule violation even if the carrier ultimately prevails on the merits.

approach should minimize burdens on directory publishers, including those that are small businesses, and is consistent with Congress' intent that carriers not use their control over subscriber list information to impede competition in directory publishing.

3. Updating Previously Purchased Subscriber List Information

116. ADP contends that directory publishers should be allowed to purchase updated subscriber list information and modify previously purchased listing information based upon the updates.[268] We agree. In requiring that each carrier provide subscriber list information "on a[n] . . . unbundled basis . . . to any person upon request for the purpose of publishing directories,"[269] Congress made clear that directory publishers could purchase updated listings without having to repurchase other subscriber list information as long as the updated listings would be used for directory publishing purposes.[270] A directory publisher typically will obtain an "initial load" of subscriber list information from a carrier that provides the carrier's subscriber list information as of a given date.[271] This information requires reformatting and other processing before it can be published in a directory. As the directory publisher performs this reformatting and other processing, the carrier continuously updates its subscriber list information databases to reflect the addition of new telephone exchange service subscribers as well as any changes in the information regarding existing subscribers. Requiring a directory publisher to repurchase a carrier's entire subscriber list information database each time the publisher wishes to update its own database would increase the difficulties many independent publishers face.[272] This is because the directory publisher either would have to reformat and process the listings in the new database so that it could be substituted for the old database, or somehow identify all the differences between the two databases and use them to update the old database.[273]

4. Obtaining Advertisers

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[268] ADP Comments at 21-22.

[269] 47 U.S.C. § 222(e).

[270] *See 1995 House Report*, *supra* note 12, at 89 (emphasis added); *1994 Senate Report*, *supra* note 13, at 97 (emphasis added).

[271] *See Great Western v. Southwestern Bell*, 63 F.3d at 1383 n.1.

[272] Arrangements under which a directory publisher repurchases a carrier's entire subscriber list information database are referred as "refresh" services. In contrast, an "update" service provides only the changes to that information occurring between specified dates.

[273] We note that a carrier need only unbundle subscriber list information to the extent its internal systems permit. *See* part II.G, *supra*.

117. New or newly relocated businesses often purchase yellow pages advertising in order to attract customers. Directory publishers affiliated with carriers use updated subscriber list information to identify these new businesses in order to target them for specific yellow pages marketing efforts.[274] ADP contends that independent directory publishers should be able to use subscriber list information obtained pursuant to section 222(e) to do the same.[275] Vitelco maintains that the plain meaning of the statutory phrase "for the purpose of publishing directories" excludes the use of subscriber list information to sell yellow pages advertising. Vitelco asserts that directory publishers can use subscriber list information obtained from other sources, such as Chambers of Commerce, to sell advertising and that it would burden small carriers to provide marketing assistance to directory publishers.[276]

118. We reject Vitelco's arguments. Neither the Communications Act nor the legislative history defines the phrase "for the purpose of publishing directories." Vitelco appears to assume that this statutory phrase encompasses only the actual printing and distribution of directories. Directory publishers, however, engage in additional activities "for the purpose of publishing directories." We conclude that these activities include the marketing of directory advertising to businesses.[277] As mentioned previously,[278] most directory publishing revenues are advertising revenues, so the marketing of directory advertising is essential to the process of publishing directories. Absent such marketing, the publisher would have no directory to print or distribute.[279] We therefore conclude that the statutory phrase "for the purpose of publishing directories" encompasses the use of subscriber list information to solicit yellow pages advertising.

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[274] ADP Reply at 6.

[275] ADP Reply at 6 & Att. 1, p. 2; *see* MCI Comments at 23-24 (carrier obtaining subscriber list information for the purpose of publishing a directory ought to be able to use that information for any purpose, including marketing); SBC Comments at 18 (directory publishing encompasses the sale of directory advertising); *cf.* Ameritech Comments at 19 (Ameritech makes updated subscriber list information available to directory publishers so they can use it to support their sales efforts).

[276] Vitelco Comments at 2-3.

[277] *See* ADP Comments at Ex. 3, p. 6 (Memorandum of U S WEST, Inc. and Landmark Publishing Co. as Amic[i] Curiae, in *BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc.*, Case No. 85-3233-CIV (So. D. Fla. filed Mar. 2, 1987)) (steps encompassed within publishing of directories include solicitation of advertisements, marketing, graphics, printing, distribution); *Great Western v. Southwestern Bell*, 63 F.3d at 1390 (relying on testimony that directory publishers need updated subscriber list information to develop sales leads).

[278] *See* part I, *supra*.

[279] SBC Comments at 18.

119. YPPA argues that companies should be prohibited from using subscriber list information obtained pursuant to section 222(e) to market local telephone services.[280] We agree. Directory publishers do not market local telephone services "for the purpose of publishing directories." The provision of local telephone services is a separate activity from the publishing of directories. We therefore conclude that the statutory phrase "for the purpose of publishing directories" does not contemplate the use of subscriber list information to market local telephone services.

K. Enforcement

120. In the *Notice*, the Commission sought comment on what procedures, if any, are required to implement section 222(e).[281] Several parties argue that we have authority under section 208 of the Communications Act to adjudicate complaints regarding compliance with section 222(e).[282] Vitelco contends that we lack such authority because the provision of subscriber list information is not a common carrier activity.[283] Vitelco maintains that State commissions, rather than the Commission, therefore should enforce section 222(e).[284]

121. We reject Vitelco's argument. Section 208(a) authorizes the Commission to adjudicate complaints from "[a]ny person . . . complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof . . . ."[285] This statutory language makes clear that a section 208 complaint must meet two conditions: the complaint must concern an act or omission by a common carrier subject to the Communications Act; and the complaint must allege that the act or omission violates a duty that the Communications Act imposes on common carriers.

122. A complaint alleging a violation of section 222(e) would meet both of these conditions. Section 222(e) imposes obligations on each "telecommunications carrier that

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[280] YPPA Reply at 9-10.

[281] *Notice*, 11 FCC Rcd at 12532, ¶ 45.

[282] *E.g.*, ADP Comments at 14-15; ALLTEL Reply at 5 (departures from nondiscrimination standard in section 222(e)(5) "may be policed by the commission under the section 208 complaint process"); YPPA Reply at 2 (statute makes clear that directory publishers may file subscriber list information complaints under section 208); *YPPA Feb. 27, 1998 Letter*, *supra* note 52, at 4.

[283] Vitelco Comments at 4-5.

[284] *Id.* at 5.

[285] 47 U.S.C. § 208(a).

provides telephone exchange service."[286] Because telephone exchange service is a common carrier service under the Act,[287] a complaint meets the first condition if it concerns an act or omission by such a carrier. In addition, because section 222(e) imposes specific obligations on each such carrier,[288] a complaint meets the second condition if it alleges that the carrier's act or omission contravenes section 222(e).

123. In part II.H, *supra*, we set forth specific requirements for complaint proceedings regarding subscriber list information rates carriers charge directory publishers. Because the Commission has otherwise comprehensive procedural rules for complaint proceedings,[289] we decline to adopt additional requirements specifically for complaints arising under section 222(e), as ADP urges.[290]

III. SECOND ORDER ON RECONSIDERATION

A. Definition of the Term "Nondiscriminatory Access"

124. We now turn to requests that we reconsider or clarify requirements adopted in the *Local Competition Second Report and Order* to ensure that LECs provide "competing providers of telephone exchange service and telephone toll service" with "nondiscriminatory access to . . . directory assistance, and directory listing" in accordance with section 251(b)(3) of the Communications Act.[291] Neither the statutory language nor our implementing rules allow requesting LECs to use listing information obtained pursuant to section 251(b)(3) to publish telephone directories.[292] Section 222(e) of the Act governs the provision of listing information that will be used in publishing directories. In part II, above, we adopt rules implementing section 222(e). To the extent that a requesting LEC wishes to publish its own directories, the manner in which it may use another LEC's listing information, and the compensation that the requesting LEC must pay to the providing LEC for the right to use

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[286] 47 U.S.C. § 222(e).

[287] *See* 47 U.S.C. §§ 153(10), (47).

[288] *Id.* (requiring the carrier to "provide subscriber list information gathered in its capacity as a provider of [telephone exchange] service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format").

[289] *See* 47 C.F.R. §§ 1.1711 *et seq.*

[290] *See* ADP Reply at 14 & Att. 1, p. 2.

[291] 47 U.S.C. § 251(b)(3).

[292] We note that in part IV.A.3, *infra*, we invite comment on whether an entity that obtains directory assistance data pursuant to section 251(b)(3) may use them for directory publishing or other purposes.

that information in publishing a directory, is governed by section 222(e) and our rules implementing that section. As we discuss below, we also seek comment today on whether sections 222(e), 251(b)(3), or other portions of the Communications Act permit competing directory assistance providers that do not themselves provide either telephone exchange access or telephone toll service nondiscriminatory access to LEC listing information.[293]

1. Background

125. In the *Local Competition Second Report and Order*, the Commission concluded that the term "nondiscriminatory access" as used in section 251(b)(3) of the Act means that a LEC that provides telephone numbers, operator services, directory assistance, and/or directory listing (i.e., the providing LEC) must permit competing providers to have access to those services that: (a) does not discriminate between or among requesting carriers in rates, terms, and conditions of access; and (b) is equal to the access that the providing LEC gives itself.[294] The Commission reasoned that any standard that would allow a LEC to offer access inferior to that enjoyed by that LEC itself would be inconsistent with Congress' intention of establishing competitive, deregulated markets for all telecommunications services.[295]

2. Discussion

126. Ameritech requests that the Commission reconsider its conclusion that the term "nondiscriminatory access" in section 251(b)(3) requires that each LEC offer access equal to that which the LEC provides to itself. Rather, Ameritech contends that the Act requires access that is merely nondiscriminatory among requesting carriers.[296] Ameritech states that if Congress had intended that providing LECs be required to supply access equal to that which they supply to themselves, it would have set forth such a requirement in clear and unambiguous language, as it did in other sections of the 1996 Act.[297] Ameritech argues that

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[293] *See* part IV, *infra*.

[294] *Local Competition Second Report and Order*, 11 FCC Rcd at 19444, ¶ 101. A "providing LEC" is a LEC that is required to permit nondiscriminatory access to its services pursuant to section 251(b)(3). *See id.* at 19444, ¶ 101, n.244. The term "competing provider" refers to a provider of telephone exchange service or a provider of telephone toll service that seeks nondiscriminatory access from a providing LEC. *Id.*

[295] *Id.* at 19444, ¶ 102.

[296] Ameritech Petition at 9.

[297] *Id.* at 8-9 (citing section 251(c)(2) of the 1996 Act, 47 U.S.C. § 251(c)(2)(C), which explicitly requires an incumbent LEC to provide interconnection that is not only "nondiscriminatory," but also "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection"). Ameritech also cites section 272, which requires BOCs to provide telephone exchange service, access exchange service, and telecommunications facilities to unaffiliated

its interpretation of Congressional intent is correct because LECs do not provide access to telephone numbers, operator services, directory assistance, and directory listings to themselves but rather provide these functions as an "integral part of the service that the local exchange carriers provide to their customers."[298] Ameritech asserts that the State commissions have extensive rules governing these services, and those rules, as well as the competitive marketplace, are sufficient to ensure that these services will be provided in an adequate manner to all customers.[299] Finally, Ameritech argues that the Commission's interpretation of Congress' nondiscriminatory access standard creates disincentives for LECs to invest in these services, because LECs will have to make such enhancements immediately available to competitors.[300]

127. AT&T, MFS, and TRA oppose Ameritech's petition, initially observing that Ameritech's arguments were raised and rejected in the *Local Competition Second Report and Order*.[301] These parties argue that requiring the providing LEC to offer access equal to that which it provides itself is an interpretation of section 251(b)(3) that is more consistent with the intent of the 1996 amendments to the Act because competing LECs cannot compete on equal terms with providing LECs without equal access to telephone numbers, operator services, and directory assistance and directory listing.[302] Noting that ". . . the underlying purpose of statutory construction . . . is to effectuate the intent of Congress,"[303] MFS also supports the Commission's interpretation of the nondiscriminatory access requirement. The Ohio Commission states that allowing access less than what the LEC provides itself is unreasonable, discriminatory and potentially anti-competitive."[304] AT&T dismisses Ameritech's assertions concerning the effect of State regulation, market conditions, and

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telecommunications providers at rates and quality levels equal to those at which the BOCs and their affiliates provide such services to themselves and to each other. *See* 47 U.S.C. §§ 272(c)(1), (e)(1), & (e)(4).

[298] *Ameritech Petition* at 10.

[299] *Id.* at 10-11.

[300] *Id.* at 11.

[301] AT&T Opposition at 12-13; MFS Opposition at 4-5; TRA Opposition at 14. MFS notes that Ameritech made the same argument concerning statutory construction previously in the proceeding, and this argument was expressly considered and rejected by the Commission in the *Local Competition Second Report and Order*, 11 FCC Rcd at 19444-46, ¶¶ 100-05.

[302] *Local Competition Second Report and Order*, 11 FCC Rcd at 19444-46, ¶¶ 100-05.

[303] MFS Opposition at 5.

[304] Ohio Commission Opposition at 3.

economic incentives on the interpretation of nondiscriminatory access.[305] According to AT&T, these arguments ask that section 251(b)(3)'s requirement concerning nondiscriminatory access be "ignored entirely."[306]

128. We deny Ameritech's request and affirm that under section 251(b)(3), "nondiscriminatory access" means that providing LECs must offer access equal to that which they provide to themselves.[307] We note initially that Ameritech made the identical argument in response to the *Local Competition Notice* that it now makes on reconsideration.[308] Nothing has changed since the adoption of the *Local Competition Second Report and Order* to alter our conclusion that section 251(b)(3)'s "nondiscriminatory access" requirement mandates a standard that such access be equal to that provided by the LEC to itself. We decided then, and affirm now, that any standard that would allow a LEC to provide access to any competitor that is inferior to that enjoyed by the LEC itself is inconsistent with Congress' objective of establishing competition in all telecommunications markets.[309]

129. Our conclusion here is entirely consistent with the *Local Competition First Report and Order*, where the Commission concluded that the 1996 Act imposed a more stringent nondiscrimination standard than that which applied under the 1934 Act.[310] Because an incumbent LEC would have the incentive to discriminate against competitors by providing them with less favorable terms and conditions than it provides to itself, we concluded that "the term 'nondiscriminatory,' as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself."[311]

130. We also reject Ameritech's contention that LECs do not provide themselves with "access" to telephone numbers, operator services, directory assistance, and directory listing, but rather provide these items as part of an overall service package. In fact, this argument is beside the point. LECs also provide loops as an integral part of their local

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[305] AT&T Opposition at 13.

[306] *Id.*

[307] *Local Competition Second Report and Order*, 11 FCC Rcd at 19444-46, ¶¶ 100-06.

[308] Ameritech Comments at 12-13. (because Congress did not expressly impose a strict equality standard in section 251(b)(3), as it did in section 251(c)(2)(C) for incumbent LECs, "the only logical interpretation is that LECs are required to provide access . . . that is nondiscriminatory among carriers").

[309] *Local Competition Second Report and Order*, 11 FCC Rcd at 19444-45, ¶¶ 100-05.

[310] *Local Competition First Report and Order*, 11 FCC Rcd at 15612, ¶ 217.

[311] *Id.*, 11 FCC Rcd at 15612, ¶ 218.

exchange service offerings, but nevertheless were required to provide loops to competitors in a manner equal to the provision of loops to themselves.[312] In order to provide telephone numbers, operator services, directory assistance, and directory listing to end users, LECs must first provide those services to themselves. To the extent that any of the items in section 251(b)(3) may also be offered as services, nothing in this *Second Order on Reconsideration* prevents the States (or seeks to supersede the States) from adopting rules and regulations concerning the quality of such services. Finally, we disagree with Ameritech's characterization of telephone numbers as a "service" subject to State regulation.[313] Telephone numbers are not a service, but rather are a public resource that provides access to the public switched telephone network.[314] Congress vested exclusive authority over the administration of numbers in this Commission, thus subjecting State regulation of numbering to Commission review.[315]

B. Burden of Proof for Showing "Nondiscriminatory Access"

1. Background

131. In the event that a dispute arises between a competing LEC and a providing LEC regarding the delivery of access pursuant to section 251(b)(3), the *Local Competition Second Report and Order* requires the providing LEC to bear the burden of demonstrating that it is permitting nondiscriminatory access, and that any disparity in access is not caused by factors within the providing LEC's control.[316] The providing LEC's burden extends to showing that it is not responsible for degraded access due to, *inter alia*, "the providing LEC's inadequate staffing, poor maintenance or cumbersome ordering procedures."[317]

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[312] *Local Competition First Report and Order*, 11 FCC Rcd at 15771-74, ¶¶ 534-40. On January 25, 1999, the Supreme Court vacated the Commission's unbundled network element rules. *AT&T v. Iowa Util. Bd.*, 119 S.Ct at 734-36. On April 16, 1999, the Commission sought further comment to refresh the record in the *Local Competition Proceeding* in order to identify those network elements to which incumbent LECs must provide nondiscriminatory access. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-70, 1999 WL 221834 (released Apr. 16, 1999). In this *Second Further Notice*, the Commission stated its "strong expectation that under any reasonable interpretation of the 'necessary' and 'impair' standards of section 251(d)(2), loops will be generally subject to the section 251(c)(3) unbundling obligations. *Id.* at ¶ 32.

[313] Ameritech Petition at 10.

[314] 47 U.S.C. § 251(e)(1) requires that numbers must be available on an equitable basis.

[315] *Id.*

[316] 47 C.F.R. § 51.217(e)(1).

[317] *Local Competition Second Report and Order*, 11 FCC Rcd at 19450-51, ¶ 115.

2. Discussion

132. SBC requests that we place the burden of proof for demonstrating non-discriminatory access on the competing provider.[318] SBC contends that placing the burden upon the providing LEC is inconsistent with section 1.254 of our rules, which places the burden of proof at any application hearing upon the applicant,[319] and section 1.255, which requires the complainant, in a hearing on a formal complaint, to open and close the proceeding.[320] SBC also states that unless the Commission reverses its decision, parties will "file formal complaints at the drop of a hat."[321] AT&T and TRA oppose SBC's comments. TRA states, for example, "[n]ot only do [providing] LECs alone have access to all information necessary to satisfy the burden, but [providing] LECs are the parties with the primary incentives to violate the prescribed regulatory requirements."[322]

133. Ameritech requests that we modify the burden of proof rule to state that if a LEC has equipment that automatically places operator services and directory assistance calls into queue on a "first-come, first-served" basis, then it need not develop further proof of nondiscrimination; and if such equipment automatically places calls in queue on a "first-come, first-served" basis without knowledge of the source, such placement is *per se* nondiscriminatory and fully meets the burden placed on a LEC by section 51.217(e)(2) of the rules.[323]

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[318] SBC Petition at 10. SBC filed a pleading styled "Petition for Reconsideration" on behalf of its subsidiaries, Southwestern Bell Telephone Company (SWBT) and Southwestern Bell Mobile Systems (SWBMS). SBC, however, did not file this pleading until October 8, 1996, one day after the 30-day filing period required by section 405(a) of the Act had expired. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d). SBC filed a motion requesting that we accept its late-filed pleading in which SBC argued, *inter alia*, that the pleading was untimely due to a "miscommunication" within the courier service that was to file the petition. MFS filed a motion to dismiss SBC's late-filed "Petition for Reconsideration" as well as an opposition to SBC's motion to accept that pleading. The filing date for petitions for reconsideration in a notice and comment rulemaking proceeding is prescribed in section 405 of the Act. 47 U.S.C. § 405(a). The Commission lacks discretion to waive this statutory requirement. *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C.Cir. 1993); *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C.Cir. 1986). We must therefore deny SBC's motion. *See id.* We will, however, treat SBC's petition as an informal comment. 47 U.S.C. § 154(i).

[319] 47 C.F.R. § 1.254.

[320] 47 C.F.R. § 1.255.

[321] SBC Petition at 10.

[322] TRA Opposition at 15; *see also* AT&T Opposition at 13-14.

[323] Ameritech Petition at 13.

134. We decline to reopen our decision to allocate the burden of proof to providing LECs in complaint actions filed by requesting carriers seeking nondiscriminatory access pursuant to section 251(b)(3). We find that SBC's suggestion that we assign the burden of proof to the complainant would effectively require parties with minimal or no knowledge of the providing LEC's network and quality of service statistics to demonstrate that they are receiving a degraded quality of service from the providing LEC relative to access obtained by other carriers or the providing LEC.[324] In the context of a complaint action pursuant to section 208 of the Act and sections 1.720-1.735 of our rules,[325] such a requirement would place an undue hardship on a requesting carrier to overcome a general denial by a providing LEC that the access provided to the complainant is degraded relative to other carriers.[326] SBC's concern that our decision will lead to frivolous complaints is unfounded. Under our rules of practice and procedure, complainants will still have the threshold burden of alleging facts which, if true, are sufficient to constitute a violation of the Act's nondiscriminatory equal access requirements.[327] Where such a *prima facie* case is alleged, we are persuaded that shifting the burden to the providing LEC to come forward with evidence in its possession to demonstrate compliance with the requirements of the Act and our implementing rules and orders will facilitate fair and expeditious resolution of the complaint.[328]

135. We also decline to provide the clarifications requested by Ameritech. It would serve no useful purpose to rule that any particular network architecture (or sub-element thereof) is *per se* nondiscriminatory where it is not used by all competing LECs and where discrimination may be introduced elsewhere in the provisioning of these services, such as by

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[324] We note that section 1.254 and section 1.255 of our rules concern formal adjudications and certain rulemaking proceedings, *see* 47 C.F.R. § 1.201, and as such are not germane to the kind of disputes discussed in the *Local Competition Second Report and Order*.

[325] 47 C.F.R. §§ 1.720 - 1.735 (rules governing the procedures to be followed when complaints are filed against common carriers). Our rules generally place the burden on complaining parties to present evidence and arguments to support a claim that a defendant carrier has violated the Act or our rules and orders. 47 C.F.R. § 1.720. The rules, however, specifically provide that we may require any party to submit additional information that we deem appropriate for a "full, fair and expeditious resolution" of a complaint. 47 C.F.R. § 1.732(g).

[326] *See, e.g.*, 47 C.F.R. § 1.724(c) (permitting defendant carriers, in certain instances, to controvert averments in a complaint by general denial).

[327] 47 C.F.R. § 1.720(b). Under subsection (c), such facts must be supported by relevant documentation or affidavit. 47 C.F.R. § 1.720(c).

[328] *See* 47 C.F.R. § 1.732(g). We released an order to implement the expedited complaint procedures mandated for certain categories of complaints by the 1996 Act and to generally improve the speed and effectiveness of our formal complaint process. *See Formal Complaints Second Report and Order*, 13 FCC Rcd at 17018-19, ¶¶ 2-5.

causing an extensive delay in initiating directory assistance service to a reseller. Our decision here, however, does not preclude a LEC from arguing in a particular case that its automatic queuing of operator services and directory assistance calls should be treated as an affirmative defense to a discrimination complaint.

C. Access to Features Adjunct to Operator Services and Directory Assistance

1. Background

136. The *Local Competition Second Report and Order* required that "[o]perator services and directory assistance services must be made available to competing providers in their entirety, including access to any adjunct features (*e.g.*, rating tables or customer information databases) necessary to allow competing providers full use of these services."[329] The Commission reasoned that, although some adjunct features such as ratings tables and customer information databases may not be "telecommunications services" as defined in section 3(44) of the Act,[330] such features must be supplied to competing providers in order to allow them to use operator services and directory assistance at a level equal to that of the providing LEC.[331] For example, it would be impossible for a competing carrier to get nondiscriminatory access to a providing LEC's directory assistance platform without access to ratings tables and customer information databases.

2. Discussion

137. Several parties request reconsideration of the requirement that LECs provide access to adjunct features as part of the nondiscriminatory access requirement.[332] These parties argue that this rule requires them to provide competitors with the LECs' proprietary software or equipment and intellectual property the LEC has licensed from third parties.[333] GTE requests that the Commission amend the rule to specify that providing LECs must offer

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[329] 47 C.F.R. § 51.217(c)(3)(iv); *see also Local Competition Second Report and Order*, 11 FCC Rcd at 19445-46, ¶ 105. "Rating tables" are databases that cross-reference area codes, numbers called, and time of day to determine the price to be charged for telephone calls. Directory assistance may use databases that contain customer names, numbers and addresses, and operator services may use databases that contain customer billing information (*e.g.*, whether a customer will accept collect calls or third party billing).

[330] 47 U.S.C. § 153(44).

[331] *Local Competition Second Report and Order*, 11 FCC Rcd at 19445-46, ¶ 105.

[332] *See, e.g.*, SBC Petition at 11-14; USTA Opposition at 12.

[333] SBC Petition at 11-14; USTA Opposition at 12.

nondiscriminatory access without associated adjunct features.[334] GTE, U S WEST, and USTA state that a LEC lacks the legal authority to provide access to software or other equipment exclusively licensed from a third party.[335] GTE also contends that Congress did not intend that nondiscriminatory access to operator services and directory assistance required access to proprietary or licensed property because, unlike section 251(d)(2), which directs the Commission to consider whether access to network elements that are proprietary in nature is necessary, no analogous provision is made in section 251(b)(3).[336] U S WEST adds that the Commission lacks authority to "seize or destroy the intellectual property of a company, at least, not without affording just compensation for the value of the property."[337] GTE and U S WEST also state that requiring access to a LECs' intellectual property discourages LECs from investing in the development of new products.[338] U S WEST cites the analysis in the *Local Competition First Report and Order*, where the Commission recognized that "prohibiting [LECs] from refusing access to proprietary elements could reduce their incentives to offer innovative services."[339] Conversely, MCI argues that there is nothing in the *Local Competition Second Report and Order* that permits a LEC to refrain from providing access to any features adjunct to operator services and directory assistance.[340]

138. The Commission reasoned in the *Local Competition Second Report and Order* that requesting carriers would not have nondiscriminatory access to operator services and directory assistance under section 251(b)(3) unless those carriers have access to adjunct features such as rating tables and customer information databases. The Commission found that, without such access, competing providers cannot make full use of operator services and directory assistance.[341] Thus, to ensure that competing providers can obtain nondiscriminatory access to operator services and directory assistance, the Commission required LECs to make these services in their entirety available to competing providers.[342]

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[334] GTE Opposition at 11.

[335] *Id.* at 9; U S WEST Opposition at 19-20; USTA Reply at 8-9.

[336] USTA Reply at 10.

[337] U S WEST Opposition at 17.

[338] GTE Opposition at 10; U S WEST Opposition at 19-20.

[339] U S WEST Opposition at 19-20 (*quoting Local Competition First Report and Order*, 11 FCC Rcd at 15641-42, ¶ 282).

[340] MCI Reply at 9.

[341] *Local Competition Second Report and Order*, 11 FCC Rcd at 19445-46, ¶ 105.

[342] *Id.*

139. We acknowledge that providing LECs have the ability to protect any intellectual property interest that they may have in any features adjunct to operator services and directory assistance. The providing LEC may enter into an appropriate license and non-disclosure agreement with the requesting LEC to ensure that the requesting LEC may use the features in the same manner as the providing LEC uses these features itself. We do not, however, expect that such agreements would in any way inhibit competing carriers from accessing the adjunct features necessary to provide operator services and directory assistance. Where adjunct features contain intellectual property licensed from third parties, we note that the Commission is addressing in another proceeding the issue of whether section 251 requires incumbent LECs to modify their intellectual property license agreements with third party vendors to the extent necessary to allow requesting carriers to use the incumbent LEC's unbundled network elements.[343] Although section 251(b)(3) is not directly at issue in that proceeding, the ruling in that order will resolve the general issue of whether incumbent LECs must provide the same rights to new entrants for the use of third party intellectual property as the incumbent LECs themselves use in order for the incumbent LECs to meet their statutory obligations under section 251.

140. We reject the argument that requiring access to proprietary features will stifle innovation. As we found in the *Local Competition First Report and Order* in the context of our adoption of national rules for unbundled elements, our experience in other telecommunications markets leads us to conclude that requiring such access will stimulate competition by incumbent LECs.[344]

D. Branding

1. Background

141. In the *Local Competition Second Report and Order*, the Commission ruled that "[t]he refusal of a providing [LEC] to comply with the reasonable request of a competing provider that the providing LEC rebrand its operator services and directory assistance, or remove its brand from such services, creates a presumption that the providing LEC is unlawfully restricting access . . . [unless] it lacks the capability to comply with the competing provider's request."[345]

142. As the Commission explained in the *Local Competition Second Report and Order*, the term "branding requirements" does not refer to the requirement that operator

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[343] *See MCI Petition for Declaratory Ruling*, CCBPol 97-4, CC Docket No. 96-98.

[344] *Local Competition First Report and Order*, 11 FCC Rcd at 15626, ¶ 245.

[345] 47 C.F.R. § 51.217(d).

services providers (OSPs) identify themselves to consumers in accordance with the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA);[346] rather, we refer to the obligations of a LEC, pursuant to section 251(b)(3), to provide non-discriminatory access to a competing provider that is using the LEC's operator services facilities in order to provide its own operator services or that is reselling the operator services of the LEC.[347] In these situations, the issue is whose brand should be used.

2. Discussion

143. NYNEX interprets our rule to require rebranding or unbranding only upon request by a carrier seeking interconnection and that the timing of such rebranding or unbranding is to be left to negotiation or the State arbitration process.[348] NYNEX also interprets this rule to mean that a LEC cannot brand its own traffic, even where identifiable, if it cannot identify all competing incoming traffic.[349] NYNEX states that a LEC should not be required to unbrand its own traffic when it is technically infeasible to perform rebranding, and states that such a requirement could put a LEC that provides interstate operator services in violation of TOCSIA's requirement that OSPs brand all interstate calls.[350] NYNEX also states that rebranding would require a separate route to and from the operator services facility for each reseller, and that current resource limitations prevent this architecture.[351]

144. U S WEST, on the other hand, interprets the rule to mean that a LEC may brand any portion of its own traffic where identifiable, even if the LEC is incapable of branding all competitors' traffic.[352] Such an arrangement occurs, according to U S WEST, when a LEC's own incoming traffic is on dedicated trunk groups and interconnecting LECs'

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[346] 47 U.S.C. § 226. TOCSIA requires an OSP to identify itself audibly and distinctly to the consumer at the beginning of each interstate telephone call, before the consumer incurs any charge for that call. 47 U.S.C. § 226(b)(1)(A); *see also* 47 C.F.R. § 64.703(a)(1). This procedure is commonly referred to as "call branding." To the extent that interstate directory assistance services are within the definition of "operator services" in section 226(a)(7) of the Act, 47 U.S.C. § 226(a)(7), the service provider is required to identify itself to consumers at the beginning of a call.

[347] *Local Competition Second Report and Order*, 11 FCC Rcd at 19453-54, ¶¶ 123-24.

[348] NYNEX Petition at 15.

[349] *See id*; *see also* U S WEST Opposition at 22.

[350] NYNEX Petition at 15.

[351] NYNEX Reply at 6.

[352] U S WEST Opposition at 22.